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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

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| JOSE A. ESCOBAR,<br><br>Petitioner Employee,<br><br>v.<br><br>THE INDUSTRIAL COMMISSION OF ARIZONA,<br><br>Respondent,<br><br>MARSHALL FOUNDATION,<br><br>Respondent Employer,<br><br>TOWER INSURANCE CO., c/o PINNACLE RISK MANAGEMENT,<br><br>Respondent Insurer. | 2 CA-IC 2011-0013<br>DEPARTMENT B<br><br>MEMORANDUM DECISION<br>Not for Publication<br>Rule 28, Rules of Civil Appellate Procedure |

SPECIAL ACTION - INDUSTRIAL COMMISSION

ICA Claim No. 20082910330

Insurer No. 2008594676

Gary M. Israel, Administrative Law Judge

AWARD AFFIRMED

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By Dee-Dee Samet
Tucson
Attorney for Petitioner Employee

The Industrial Commission of Arizona
By Andrew F. Wade — Phoenix
Attorney for Respondent

Frank W. Frey — Tucson
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E S P I N O S A, Judge.

**¶1** In this statutory special action, petitioner Jose Escobar seeks review of the administrative law judge's (ALJ's) decision affirming the Industrial Commission's award of continuing benefits and findings of average monthly wage. For the following reasons, we affirm.

**Factual Background and Procedural History**

**¶2** We view the evidence "in the light most favorable to sustaining the findings and award of the Industrial Commission and will not set aside the award if it is based upon any reasonable interpretation of the evidence." *Rent A Ctr. v. Indus. Comm'n*, 191 Ariz. 406, ¶ 1, 956 P.2d 533, 534 (App. 1998), *quoting Ariz. Dep't of Pub. Safety v. Indus. Comm'n*, 176 Ariz. 318, 324, 861 P.2d 603, 609 (1993). In October 2008, Escobar sustained a work-related injury while employed at the Marshall Foundation, and respondent insurer Tower Insurance Co. (Tower)[1] accepted his claim for benefits. In its notice dated March 9, 2009, the Industrial Commission determined Escobar's average

[1]Tower Insurance Co. utilizes Pinnacle Risk Management Services to administer its claims. Castlepoint Management Co. is a subsidiary of Tower Insurance Co. and initially hired Pinnacle to service Escobar's claim.

monthly wage was $1,756.22 and, in both English and Spanish, directed Escobar to submit any protest of the decision within ninety days. *See* A.R.S. § 23-947(A).

**¶3** In February 2010, Escobar consulted with his attorney and learned the Industrial Commission could have inaccurately calculated his average monthly wage by not including his earnings from concurrent employment at the Marriott Hotel, and in April 2010 he filed a request for review of the Industrial Commission's average monthly wage determination. A hearing was conducted before an ALJ to determine whether Escobar could bring an untimely challenge to the wage determination.

**¶4** At the hearing, Escobar denied having received the March 9, 2009, notice of average monthly wage, although he admitted he had received other notices from the insurer, including notices dated March 16, March 26, August 19, and September 1 of 2009. Escobar nevertheless argued his late filing should be excused because he had only a ninth grade education in Mexico, speaks and writes only in Spanish, and could not read or understand the notices written in English. Alternatively, he argued that even if he received the notice, he failed to timely submit his challenge because he had relied on the commission's misleading representations within its notices that it had made an independent wage determination, and on verbal representations made in August 2009 by a female Industrial Commission representative whose name was transcribed phonetically from Escobar's testimony as "Kevin" and who allegedly promised if Escobar sent her some papers she would "see what [she could] do" about his second job. Neither the Industrial Commission claims representative nor the insurer's claims adjuster, however,

had any recollection or documentation of such a conversation. Escobar testified he had kept the notices "private" and first learned his wage determination was inaccurate when he sought assistance of counsel in February 2010 on an unrelated issue.

**¶5** The ALJ dismissed Escobar's request for a hearing as untimely, finding he had failed to show by clear and convincing evidence that the notice was not received or that his delay was caused by justifiable reliance on a representation by the Industrial Commission, citing *Borquez v. Industrial Commission*, 171 Ariz. 396, 831 P.2d 395 (App. 1991), and *Chavis v. Industrial Commission*, 180 Ariz. 424, 885 P.2d 122 (App. 1994). The ALJ affirmed the award on review, and Escobar brought this statutory special action. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(2) and 23-951(A).

**Discussion**

**¶6** Escobar argues the ALJ erred by failing to excuse his untimely hearing request.[2] We review the ALJ's determination for an abuse of discretion, deferring to his findings if there is substantial evidence to support them. *See Blickenstaff v. Indus. Comm'n*, 116 Ariz. 335, 338, 569 P.2d 277, 280 (App. 1977). Any hearing request was required to have been filed within ninety days of the March 9, 2009, notice of average monthly wage. *See* § 23-947(A). Because Escobar did not file his request until April 13, 2010, it is necessary to determine whether there is any statutory excuse for his late filing. *See Borquez*, 171 Ariz. at 397, 831 P.2d at 396.

[2]Escobar raises additional arguments relating to his protest of the average monthly wage, but we do not reach them because we find the ALJ did not abuse his discretion in rejecting Escobar's untimely request for a hearing.

**¶7** An employee's failure to file a request for hearing to contest the determination of the commission within ninety days of notice renders the commission's determination "final and res judicata to all parties." § 23-947(B). Section 23-947(B) provides that a late filing shall not be excused unless:

> 1. The person . . . does not request a hearing because of justifiable reliance on a representation by the commission, employer or carrier. . . . "[J]ustifiable reliance" means that the person . . . has made reasonably diligent efforts to verify the representation, regardless of whether the representation is made pursuant to statutory or other legal authority.
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> 2. At the time the notice is sent the person . . . is suffering from . . . legal incompetence or incapacity . . . .
>
> 3. The person . . . shows by clear and convincing evidence that the notice was not received.

No late filing shall be excused "if the person to whom the notice is sent or the person's legal counsel knew or, with the exercise of reasonable care and diligence, should have known of the fact of the notice at any time during the filing period." § 23-947(C).

**¶8** Escobar asserts there was clear and convincing evidence he did not receive the March 9, 2009, notice of wage determination, and therefore his late filing should be excused. *See* § 23-947(B)(3). The only evidence supporting Escobar's contention was his own testimony. He stated his mailbox is located in front of his residence, but "[s]ometimes we get lost mail and everybody in the neighborhood[. . . a] lot of times we find mail in the street." But Escobar's testimony that he had not received the March 9 notice was undermined when he acknowledged on cross-examination that he had received notices dated March 16 and March 26, 2009, which contained the same ninety-

day warning, as well as payments mailed to the same address. He acknowledged the March 9 notice was properly addressed, and it had not come to his attention that any other pieces of mail were lost during March. Additionally, an Industrial Commission representative testified the March 9, 2009, notice was mailed according to the commission's usual and customary practice, and the ALJ took judicial notice that Escobar's Industrial Commission file contained no indication any mail to Escobar had been returned as undeliverable.[3] *See Blickenstaff*, 116 Ariz. at 337-38, 569 P.2d at 279-80 (service accomplished by mailing to proper address, and claimant assented to any delivery deficiency arising after notice placed in mailbox). We defer to the ALJ's determination of Escobar's credibility, and find there was sufficient evidence to support his conclusion that Escobar had failed to prove non-receipt of the March 9 notice by clear and convincing evidence. *See Ohlmaier v. Indus. Comm'n*, 161 Ariz. 113, 117, 776 P.2d 791, 795 (1989); *Blickenstaff*, 116 Ariz. at 338, 569 P.2d at 280 (applying abuse of discretion standard).

**¶9** Escobar nonetheless argues that, even if the ALJ's determination regarding his receipt of notice is upheld, his untimeliness should be excused based on his justifiable reliance on the Industrial Commission's written representation that it independently had reviewed his average monthly wage and the wage in the notice was correct. In support,

[3]Escobar argues the reliability of the United States Postal Service is "a thing of the past," and the court therefore should not have presumed properly addressed mail to have been received. But the burden was on Escobar to produce clear and convincing evidence that the notice was not received, *see* § 23-947(A)(3), and the ALJ determined that Escobar had not carried that burden.

Escobar relies on *Holler v. Industrial Commission*, 140 Ariz. 142, 146, 680 P.2d 1203, 1207 (1984), in which our supreme court stated, "When a neutral arbitrator, like the commission, certifies that an independent determination has been made, a claimant is justified in relying on the accuracy of that determination." But, as Tower points out, this court has since determined that the legislature "expressly repudiated the interpretation of justifiable reliance adopted by the supreme court in its 1984 *Holler* opinion" by amending § 23-947(B)(1) in 1987 to adopt "reasonably diligent efforts" as the standard for determining a claimant's justifiable reliance. *Borquez*, 171 Ariz. at 398, 831 P.2d at 397; *see* 1987 Ariz. Sess. Laws 3d Spec. Sess., ch. 2, § 4. The amended statute "imposes an unconditional duty on claimants to make reasonably diligent efforts to verify the wage information reported." *Chavis*, 180 Ariz. at 428, 885 P.2d at 116. Therefore, Escobar's reliance on *Holler* is misplaced.

**¶10** When a claimant makes no effort to verify the accuracy of the average monthly wage within the time allowed for filing a protest, he has failed to fulfill his statutory duty of diligence. *Chavis*, 180 Ariz. at 428, 885 P.2d at 116. Escobar admitted he had desired to keep his wage information confidential, had first contacted the commission to inquire about his wage in August 2009, and had first sought assistance of counsel to interpret the notices in February 2010. Although he may not have known the exact amount he earned during the month before his injury because his hours at the Marriott varied, Escobar could have compared the commission's wage determination to his own pay stubs. *See id.* This supports the ALJ's conclusion that a reasonable person

would have at the least contacted the Industrial Commission or insurer to question whether the average monthly wage determination included the earnings from the Marriott. The fact that the wage was set pursuant to the commission's statutory authority does not excuse Escobar from making reasonably diligent efforts to verify the commission's determination. *See Borquez*, 171 Ariz. at 399, 831 P.2d at 398 (independent determination upheld when based upon information provided to commission by employer and carrier, even though information incorrect and no efforts to verify accuracy). The record supports the ALJ's determination that Escobar made no attempt, let alone diligent efforts, to verify the wage calculation during the ninety-day period following notice. *See Blickenstaff*, 116 Ariz. at 338, 569 P.2d at 280.

**¶11** Escobar contends, however, the Industrial Commission should independently determine a claimant's average monthly wage, "not just blithely accept the Carrier's recommendation," and even if *Holler* is no longer the law, "the pronouncements and spirit set forth about the workers[']compensation law still stands." *See* A.R.S. § 23-1061(F).[4] He maintains the Industrial Commission violates its statutory duty by

[4]This statute provides in part:

> In all cases where compensation is payable, the carrier or self-insuring employer shall promptly determine the average monthly wage pursuant to § 23-1041. Within thirty days of the payment of the first installment of compensation, the carrier or self-insuring employer shall notify the employee and commission of the average monthly wage of the claimant as calculated, and the basis for such determination. The commission shall then make its own independent

failing to independently review the wage and affirmatively seek wage information from an injured employee, and that the average monthly wage determination made after such failures should be found void or a late petition for hearing allowed.[5] This argument was rejected in *Borquez*, which held the commission's duty to make an independent determination may be "satisfied by the use and recomputation of the figures presented by the carrier." 171 Ariz. at 398, 831 P.2d at 397, *citing Harris v. Indus. Comm'n*, 24 Ariz. App. 319, 538 P.2d 406 (1975). Escobar apparently urges a change in this court's interpretation of § 23-947, citing cases that voice the public policy of protecting injured workers,[6] but he raises no compelling reason that would justify abrogating established precedent, on which the ALJ properly relied.

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> determination of the average monthly wage pursuant to [the] § 23-1041 [basis for computing compensation].

[5]Escobar also argues Tower too had a duty to ensure the commission set the proper wage and Tower's actions should be considered misrepresentations to the petitioner. Although Escobar raised the issue in his request for review, there was no testimony at the hearing on Tower's alleged breach of duty and the ALJ therefore could not have considered Escobar's argument on review. *See* A.R.S. § 23-943(E); *Stephens v. Indus. Comm'n*, 114 Ariz. 92, 94-95, 559 P.2d 212, 214-15 (App. 1977). Our review is limited to the same matters that the ALJ could consider in its review of its own decision. *Stephens*, 114 Ariz. at 95, 559 P.2d at 215.

[6]*See, e.g.*, *Stephens v. Textron, Inc.*, 127 Ariz. 227, 230, 619 P.2d 736, 739 (1980) (public policy to first protect injured employee and secondarily to protect compensation fund); *English v. Indus. Comm'n*, 73 Ariz. 86, 89, 237 P.2d 815, 817 (1951) (Act should be construed to best promote purpose of compensating injured worker for loss of earning power); *Bonnin v. Indus. Comm'n*, 6 Ariz. App. 317, 321, 432 P.2d 283, 287 (1967) (Act should be liberally interpreted in favor of injured worker); *see also* Ariz. Const. art. XVIII, § 8 (legislature shall enact "just and humane compensation law" to compensate worker injury, and "for the relief and protection of such workmen . . . from the

**¶12** Lastly, Escobar argues that his limited education and ignorance of the law caused him to mistakenly believe that the Industrial Commission's approval signified the wage determination was correct, and his reliance upon the wage determination constituted reasonable diligence for a person of his education. Indeed, Escobar went further below, arguing that his educational status qualified as incapacity under § 23-947(B)(2). However, the March 9 notice contained a duplicate ninety-day deadline warning in Spanish, which Escobar admitted he could read and understand. And the March 16, 2009, notice, which Escobar acknowledged receiving, contained the same admonition in both English and Spanish. The ALJ also could consider that Escobar testified in English at the hearing without an interpreter. It could reasonably conclude Escobar's limited formal education did not excuse his lack of diligence and does not constitute "legal incompetence or incapacity." *See* § 23-947(B)(2).

**Disposition**

**¶13** For the foregoing reasons, the ALJ's decision denying Escobar's untimely request for a hearing to challenge the accuracy of his compensation is affirmed. Tower requests its attorney fees and costs on appeal pursuant to A.R.S. §§ 12-349 and 12-350; Rules 21(c) and 25, Ariz. R. Civ. App. P.; and Rule 4(g), Ariz. R. P. Spec. Actions, on the grounds that Escobar's arguments are not supported by law or evidence of record, and because these precise arguments have twice been brought to Arizona appellate courts and

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burdensome, expensive and litigious remedies for injuries . . . producing uncertain and unequal compensation therefor.").

twice been rejected. *See Chavis*, 180 Ariz. 424, 885 P.2d 112; *Borquez*, 171 Ariz. 396, 831 P.2d 395. Because Escobar argues for a new interpretation of § 23-947 based upon public policy concerns, we do not find his appeal to have been brought without any justification. *See* §§ 12-349(A)(1), 12-350(5). Therefore, Tower's request for attorney fees is denied. As the successful party, Tower is entitled to its costs of appeal, contingent upon its compliance with Rule 21, Ariz. R. Civ. App. P., and Rule 4(g), Ariz. R. P. Spec. Actions.

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge